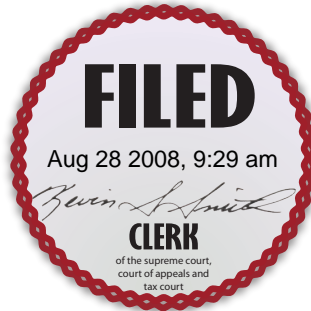


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE  
COURT OF APPEALS OF INDIANA**

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THOMAS L. BAKER,  
  
Appellant-Defendant,

vs.

STATE OF INDIANA,  
  
Appellee-Plaintiff.

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No. 53A04-0712-CR-726

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APPEAL FROM THE MONROE CIRCUIT COURT  
The Honorable Kenneth G. Todd, Judge  
Cause No. 53C03-0704-CM-01297

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**August 28, 2008**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**VAIDIK, Judge**

## **Case Summary**

After a jury trial, Thomas L. Baker was convicted of operating a vehicle while intoxicated as a Class C misdemeanor. On appeal, he contends that the evidence is insufficient to prove that he was intoxicated. Concluding that the evidence is sufficient, we affirm.

## **Facts and Procedural History**

On March 31, 2007, at approximately 2:45 a.m., Indiana State Troopers William Day and Mike Adams initiated a traffic stop after witnessing a green Ford Explorer traveling southbound on College Avenue in Bloomington, Indiana, at approximately forty-two miles per hour (in a thirty mile per hour zone) and swerving over the center line twice. After Trooper Day approached the vehicle and asked the driver, Baker, for his license and registration, he smelled a strong odor of alcohol on his breath. While talking with Baker regarding the reason for the stop, Trooper Day “noticed that when [Baker] did speak to me, he slurred some of his . . . words, spoke kind of . . . slow . . . [a]nd I also noticed that he had what I call glassy eyes.” Appellant’s App. p. 21. While retrieving his registration, Baker proceeded to “[fumble] through it dropping pieces here and there . . . .” *Id.*

Thereafter, Trooper Day asked Baker to step out of the car in order to conduct a field sobriety test. Baker indicated that he had not committed any crime and was not getting out of the vehicle. Trooper Adams then approached the car and also tried to persuade Baker to exit the vehicle for the field sobriety test, but Baker again refused. After Baker refused to exit several more times, the troopers removed Baker’s seatbelt,

picked him up, and laid him down in the grass between the road and the sidewalk. Baker again refused a field sobriety test, but consented to a Horizontal Gaze Nystagmus test (HGN).<sup>1</sup> Baker exhibited all six of the HGN indicators, which meant there was a probability of at least seventy-seven percent that his BAC was above the legal limit of .08 percent. After Baker refused to submit to a breathalyzer test or walk to the police car, the troopers picked him up and carried him to the police car. Thereafter, the troopers transported Baker to the Monroe County Jail.

The State charged Baker with operating a vehicle while intoxicated as a Class A misdemeanor.<sup>2</sup> At the conclusion of his trial, a jury found him guilty of the lesser-included offense of operating a vehicle while intoxicated as a Class C misdemeanor.<sup>3</sup> The trial court sentenced Baker to a prison term of sixty days with thirteen days executed, forty-six days suspended, and three hundred and fifty days of probation. Baker now appeals.

### **Discussion and Decision**

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<sup>1</sup> As defined in *Johnson v. State*, 879 N.E.2d 649, 652 n.2 (Ind. Ct. App. 2008),

Horizontal gaze nystagmus is the inability of the eyes to maintain visual fixation as they are turned to the side. In the HGN test the driver is asked to cover one eye and focus the other on an object (usually a pen) held by the officer at the driver's eye level. As the officer moves the object gradually out of the driver's field of vision, toward his ear, he watches the driver's eyeball to detect involuntary jerking. The test is repeated with the other eye. By observing (1) the inability of each eye to track movement smoothly, (2) pronounced nystagmus at maximum deviation, and (3) onset of nystagmus at an angle less than 45 degrees in relation to the center point, the officer can estimate whether the driver's blood alcohol content (BAC) exceeds the legal limit of .10 percent.

<sup>2</sup> Ind. Code § 9-30-5-2(b).

<sup>3</sup> I.C. § 9-30-5-2(a).

Baker maintains that the State presented insufficient evidence that he was intoxicated and that, therefore, his conviction for operating a vehicle while intoxicated must be reversed. When reviewing a claim of sufficiency of the evidence, we do not reweigh the evidence or judge the credibility of witnesses. *Jones v. State*, 783 N.E.2d 1132, 1139 (Ind. 2003). We look only to the probative evidence supporting the judgment and the reasonable inferences from that evidence to determine whether a reasonable trier of fact could conclude the defendant was guilty beyond a reasonable doubt. *Id.*

In order to prove that Baker was guilty of operating a vehicle while intoxicated as a Class C misdemeanor, the State was required to prove beyond a reasonable doubt that Baker operated a vehicle while intoxicated. Ind. Code § 9-30-5-2(a). Here, the only element at issue is whether Baker was “intoxicated.” The term “intoxicated” is defined by statute as “under the influence of : (1) alcohol . . . so that there is an impaired condition of thought and action and the loss of normal control of a person’s faculties.” Ind. Code § 9-13-2-86. Proof of intoxication may be established by showing impairment. *Ballinger v. State*, 717 N.E.2d 939, 943 (Ind. Ct. App. 1999). “Evidence of the following can establish impairment: (1) the consumption of significant amounts of alcohol; (2) impaired attention and reflexes; (3) watery or bloodshot eyes; (4) the odor of alcohol on the breath; (5) unsteady balance; (6) failure of field sobriety tests; and (7) slurred speech. *Id.*

Here, the evidence shows that Baker was exceeding the speed limit and had twice swerved over the center line of the road. Baker’s breath smelled of alcohol, his speech was slurred, and he had “glassy eyes.” Appellant’s App. p. 21. Moreover, while

attempting to retrieve his registration, Baker fumbled through it, and he failed the HGN test. This is strong evidence of intoxication. Nonetheless, Baker maintains that his conviction is based solely on the HGN test and that the HGN test is “insufficiently accurate to sustain the State’s burden of proving . . . that . . . [he] was intoxicated.” Appellant’s Br. p. 4. This same argument was made to and ultimately rejected by the jury. Thus, Baker’s argument in this regard is merely a request that we reweigh the evidence, which we cannot do. The evidence is sufficient to support Baker’s conviction for operating a vehicle while intoxicated.

Affirmed.

KIRSCH, J., and CRONE, J., concur.